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The WTO EC-Seal Products Decision: Animal Welfare, Indigenous Communities and Trade (shorter version)

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EUROPEAN COMMUNITIES—MEASURES PROHIBITING THE IMPORTATION AND MARKETING OF SEAL PRODUCTS. WT/DS400/AB/R, WT/DS401/AB/R. *At* http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.
World Trade Organization Appellate Body, May 22, 2014 (adopted June 18, 2014).

By Gregory Shaffer and David Pabian[i]

World Trade Organization—Agreement on Technical Barriers to Trade—General Agreement on Tariffs and Trade—discrimination—protection of public morals regarding animal welfare—indigenous communities

On May 22, 2014, the World Trade Organization's Appellate Body (AB) issued its report on the controversial "*EC—Seal Products*" dispute,[1] finding that a European Union (EU or Union) prohibition on the importation and sale of seal products violated the General Agreement on Tariffs and Trade 1994 (GATT).[2] It did so, however, in a way that largely upheld the Union's defense on animal welfare grounds, so that the prohibition remains effective. The decision marks the first time that the Appellate Body has found that a trade ban on animal welfare grounds falls within the exception under GATT Article XX(a) for measures necessary to protect public morals. This determination implicates the legality of future trade restrictions on animal welfare grounds, as well as restrictions imposed on human rights grounds, such as labor rights.

In 2009, through Regulation No. 1007/2009 and implementing Regulation No. 737/2010,[3] the European Union prohibited the importation and sale of seal products on animal welfare grounds, subject to an exception for seal products from traditional hunts conducted by Inuit and other indigenous communities (the IC exception), as well as an exception for products from seals hunted for purposes of marine resource management. Shortly afterward, Canada and Norway challenged the EU regulation and implementing regulation (collectively, EU seal regime) under the WTO Agreement on Technical Barriers to Trade (TBT Agreement or TBT)[4] and the GATT. Their primary claims under the TBT Agreement were that the EU seal regime was discriminatory (under

[1] Appellate Body Report, European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014) (*adopted* June 18, 2014) [hereinafter AB Report].

[2] General Agreement on Tariffs and Trade [GATT], Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 UNTS 154 [hereinafter Marrakesh Agreement], Annex 1A, 1867 UNTS 190, *reprinted in* WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 3, 17 (1999) [hereinafter LEGAL TEXTS].

[3] Regulation (EC) 1007/2009 of the European Parliament and of the Council on Trade in Seal Products, 2009 O.J. (L 286) 36; Commission Regulation (EU) 737/2010 Laying down Detailed Rules for the Implementation of the Regulation (EC) 1007/2009, 2010 O.J. (L 216) 1.

[4] Agreement on Technical Barriers to Trade, Marrakesh Agreement, *supra* note 2, Annex 1A, 1868 UNTS 120 [hereinafter TBT Agreement], *reprinted in* LEGAL TEXTS, *supra* note 2, at 121.

Article 2.1) and more trade-restrictive than necessary (under Article 2.2). They also contended that the EU ban violated GATT Article I (the most-favored-nation clause) and Article III:4 (the national treatment clause). The European Union defended the GATT claims under Article XX(a) regarding measures "necessary to protect public morals" and Article XX(b) regarding measures "necessary to protect . . . animal . . . life or health."

Today only a few countries hunt seals and trade in seal products, including Canada, Norway, and Greenland. The primary methods for hunting seals are with a heavy wooden club topped with a metal piece known as a hakapik, and firearms or harpoons (although some indigenous communities also use nets). Because seals are often located on ice floes and in other inhospitable areas, their killing and recovery can be difficult, resulting in the infliction of suffering on the animals and some difficulty in overseeing the kills. Canada and Norway permit the harvesting of seals and the sale of seal products but have adopted regulations that, among other matters, aim at ensuring "a humane kill."

Following the ban, Greenland was the only country from which seal products were permitted into the EU market under the IC exception, and thus the only country that imported them in significant quantities. EU member states themselves engage in almost no seal hunting, and only Sweden sells a small number of skins from seals culled under the marine resource management exception.

The panel held that the TBT Agreement applied, and that the EU seal regime violated Article 2.1 of that agreement because it was discriminatory.[5] For the TBT Agreement to apply, the EU seal regime must constitute a "technical regulation," as defined in Annex 1.1, which requires the meeting of certain criteria, in particular that the measure must "lay[] down product characteristics or their related processes and production methods," and be mandatory. The Appellate Body overruled the panel's finding that the measure lays down "product characteristics" because, when seen in light of the exceptions, the measure establishes "the conditions for placing seal products on the EU market" based on the identity of the hunter or purpose of the hunt, and does not prescribe product characteristics (paras. 5.58–.59). The Appellate Body declined to pursue whether the measure alternatively constituted a technical regulation because it laid down "processes and production methods" since the panel had not done so, and consequently declared the panel's findings under the TBT Agreement devoid of legal effect (para. 5.70).

The Appellate Body then turned to the GATT claims and defenses. The first issue was the legal standard for deciding GATT Article I.1 and III:4 claims, in particular in relation to TBT Article 2.1 in light of new WTO jurisprudence. Regarding technical regulations, TBT Article 2.1 requires members to ensure that another member's products are accorded no less favorable treatment than that accorded to like products, whether of national origin or from any other country.[6] GATT Articles III:4 and I contain very similar language that respectively covers less favorable treatment of products of national origin (Article III.4) and products from other countries (Article I).[7] The European Union argued that the GATT nondiscrimination provisions apply the same legal standard as recently applied to TBT Article 2.1. Canada and Norway disagreed, as did the panel.

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[5] Panel Report, European Communities—Measures Prohibiting the Importation and Marketing of Sea; Products, WT/DS400/R, WT/DS401/R (Nov. 25, 2013) (*adopted* June 18, 2014) [hereinafter Panel Report].

[6] TBT Agreement, *supra* note 4, Art. 2.1 (emphasis added).

[7] GATT, *supra* note 2, Arts. III:4, I, respectively.

The Appellate Body has found that a finding of "less favourable treatment" under TBT Article 2.1 requires the showing of *two* elements: the measure adversely affects the competitive opportunities for imports, and such an effect reflects discrimination as opposed to "a legitimate regulatory distinction."[8] In *EC—Seal Products* the Appellate Body held that, by contrast, only the first of these two findings is required for a claim under GATT Articles I:1 or III:4 because GATT Article XX addresses the second issue separately (paras. 5.82, 5.125). On the basis of this test, the Appellate Body upheld the panel's findings of violations of both GATT Article I (since the vast majority of Canadian and Norwegian seal products, unlike those from Greenland, did not qualify under the IC exception), and GATT Article III:4 (since the vast majority of Canadian and Norwegian products, unlike domestic production from Sweden, did not qualify under the marine resource management exception). Because the panel and the Appellate Body considered the seal regime's prohibitive aspects (the ban) together with its permissive aspects (the exceptions), they found discrimination, even though both the ban and the exceptions were origin neutral when viewed separately (paras. 5.188, 5.189).

The Appellate Body then turned to the Article XX defense and addressed three issues: the regulatory objective behind the EU measure; whether the EU measure was "necessary to protect public morals" under Article XX(a) in light of this objective; and, if so, whether the measure nonetheless constituted arbitrary or unjustifiable discrimination under the chapeau.

The European Union maintained that its seal regime addressed the moral concerns of EU citizens about seal welfare and contributed to that welfare by reducing the inhumane killing of seals.[9] The Union defended the IC exception by distinguishing between commercial hunts and hunts that provide, at least in part, for the subsistence of an indigenous community, and it cited in support two international law documents regarding the protection of indigenous communities' cultural rights: the United Nations Declaration on the Rights of Indigenous Peoples and the International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries.[10] The complainants argued that the IC exception and the substantial, commercial-level imports from Greenland prevented the EU seal regime from falling within a public morals exception for animal welfare (para. 5.141). The Appellate Body, however, upheld the panel's finding, based on the text and legislative history of the seal regime, that the "principal" or "main" objective of the EU measure was to address public morals regarding seal welfare (paras. 5.139, 5.146, 5.166).

Turning to the EU Article XX(a) defense, the Appellate Body confirmed that "the term 'public morals' denotes 'standards of right and wrong conduct maintained by or on behalf of a community or nation,' "[11] and noted that "Members should be given some scope to define and

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[8] *E.g.*, Appellate Body Report, United States—Measures Affecting the Production and Sale of Clove Cigarettes, para. 175, WT/DS406/AB/R (Apr. 4, 2012) (*adopted* Apr. 24, 2012) (reported by Tania Voon at 106 AJIL 824, 826–27 (2012)).

[9] Panel Report, *supra* note 5, para. 7.274.

[10] *Id.*, paras. 7.369, 7.292 (citing Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, annex (Sept. 13, 2007); International Labour Organization, Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 ILM 1382 (1989), *available at* http://www.ilo.org/ilolex).

[11] AB Report, para. 5.1999 (quoting Panel Report, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, para. 6.465, WT/DS285/R (Nov. 10, 2004) (*adopted* Apr. 20, 2005)).

apply [such standards] for themselves" (para. 5.199). It also held that the Union did not need to specify an exact standard of right and wrong, identify a specific risk, or be consistent in addressing that risk across animal welfare domains, such as the hunting of deer and other animals (paras. 5.194–.201).

The Appellate Body then applied a balancing test in which it weighed the importance of the trade impact (a ban), the importance of the objective (moral concerns regarding seal welfare), and the contribution of the measure to that objective. Finding that the panel had a degree of latitude to determine the key issue of contribution, and that its analysis can involve only qualitative and prospective reasoning where the contribution is difficult to isolate without the benefit of time (para. 5.221), the Appellate Body upheld the panel's conclusion that the measure contributes to the EU policy objective "to a certain extent" by reducing global demand for seal products, even though the exceptions diminish that contribution (para. 5.289).

The other contentious issue was whether the measure was "necessary" because a less-trade-restrictive alternative was "reasonably available" (paras. 5.180, 5.182). Canada and Norway had proposed conditioning imports on the use of humane killing standards, which would be backed by certification and labeling requirements (para. 5.262). Since the EU seal regime permits indigenous hunting and the panel found that certain of such hunts use less humane killing techniques, Canada and Norway maintained that this alternative would meet the EU seal welfare goals while being less restrictive of trade. The Appellate Body upheld the panel's finding that the alternative was not reasonably available and would not necessarily meet the EU goals because it could "subject[ ] a greater number of seals to the animal welfare risks incidental to seal hunting" and not assure the use of more humane practices given the difficulty of monitoring seal hunts.[12] Although expressing "certain doubts" about the panel's reasoning, the Appellate Body decided that the panel had not held the complainants' proposed alternative to a higher requirement than the actual EU measure (para. 5.280). As a result, the Appellate Body found that the animal welfare measure fell within the GATT Article XX(a) public morals exception.

The European Union nonetheless lost the case under the Article XX chapeau, which provides that a measure falling within a listed exception must not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." The Appellate Body reversed the panel for applying the wrong legal test by relying on its analysis under TBT Article 2.1 and not conducting an independent analysis under the chapeau, which has a different text, context, and function (paras. 5.310–.313). The Appellate Body maintained that the chapeau is designed "to prevent the abuse" of a member's right to invoke an exception, and that the burden lies on the respondent invoking the exception to show that "the design, architecture, and revealing structure of the measure" do not lead to arbitrary or unjustifiable discrimination (paras. 5.297, 5.302).

The Appellate Body found that the European Union had failed to meet its burden on a series of grounds. First, the Appellate Body considered whether the Union demonstrated that the discrimination "is rationally related to" the policy objective of the measure, which it had found to be the protection of EU public morals concerns regarding seal welfare. Although it noted the EU argument that the IC exemption was intended "to mitigate the adverse effects on those communities," it found that the Union failed to show such a rational relationship and that it could not "do anything further" to protect the welfare of seals in indigenous hunts (paras. 5.318–.320).

[12] *Id.*, para. 5.266 (quoting Panel Report, para. 7.482).

Second, the Appellate Body held that the design of the exception did not safeguard against its potential abuse, which could lead to the import of seal products from commercial-like hunts. The EU criteria for the IC exception were to show an indigenous tradition of seal hunting, the use of part of the seal products within the indigenous community in a traditional manner, and the contribution of that use to the community's subsistence. According to the Appellate Body, both the subsistence and partial use criteria were ambiguous and not properly monitored, and thus could lead to the exception's abuse (paras. 5.324–.327).

Third, the Appellate Body found that the European Union did not meet its burden to show that it had "made 'comparable efforts' to facilitate the access of the Canadian Inuit to the IC exception."[13] It noted, in particular, that Danish authorities had processed imports from Greenland prior to the establishment of a recognized Greenlandic authority, as required under the EU regulation, and that the Union could have pursued further "cooperative arrangements" with the Canadian Inuit (para. 5.337). The Appellate Body therefore concluded that the IC exception was designed and applied in an arbitrary and unjustifiable manner, and thus failed to meet the chapeau's requirements (para. 5.339).

* * * *

The *EC—Seal Products* case is the first to apply the "public morals" exception to animal welfare. It could thus implicate an array of products involving animal welfare concerns, such as cosmetics tested on animals and meat from animals raised in small pens and cages. A broad public morals exception also implicates human rights during the production process, such as labor rights, potentially affecting all products. The Appellate Body explicitly recognized its decision's implications and raised, on its own initiative, the issue of the "systemic importance" of "an implied jurisdictional limitation" to Article XX(a), since the EU seal regime addresses activities "outside the Community." But it did not examine the question further because neither the parties nor the panel had addressed it (para. 5.173).

Given the decision's systemic importance, it is important to assess what guidance the AB provided for the future. The result disappoints.

Most troubling is the AB report's lack of clear reasoning accessible to a broader public. Although WTO cases are generally complex and legalistic, past cases of systemic importance have set forth clearer reasoning. This report, by contrast, is crammed with judicial bureaucratese, and will generate no memorable citations to its prose. In fact, it appears to have been almost purposefully written to avoid engagement with an audience besides trade insiders in Geneva and a few national capitals, a few academics, and some specialized WTO lawyers.

Most of the decision boils down to a series of holdings that *x* means *y* and not *z* based on circular citations to past AB reports. Given the Appellate Body's authority, this practice is unacceptable. To support its findings, the Appellate Body cited dictionaries and sixty-seven previous panel and AB decisions, but it provided few guiding principles. It may well be that the Appellate Body should not decide highly contested principles in a single case. But that is no excuse for a lack of reasoning with which a broader audience can engage because no principles are

[13] *Id.*, para. 5.337 (quoting Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia, para. 122, WT/DS58/AB/RW (Oct. 22, 2001) (*adopted* Nov. 21, 2001)).

discussed. In this report, the Appellate Body retreated from any broader engagement with those ultimately affected by WTO law.

Nevertheless, some merits can be seen in the outcome. First, the Appellate Body rightly placed some limits on the coverage of the TBT Agreement by overruling the panel's finding that a ban with exceptions based on the type of hunter and hunt lays down "product characteristics" and is thus a technical regulation. Where a measure involves a ban imposed on moral grounds (as both the panel and the Appellate Body found), the panel's determination seems stretched. The Appellate Body's actual reasoning in overruling the panel, however, is anything but clear. The Appellate Body could have explained why a ban imposed on moral grounds does not lay down product characteristics, but instead it stressed the case-specific nature of its decision. Therefore, stakeholders are left knowing only that there are limits to the TBT Agreement's scope that will be decided on a case-by-case basis.

Second, the Appellate Body found that, to prove a violation of GATT Articles I and III:4, a complainant needs only to show a disparate impact on the conditions for competition, regardless of the origin-neutral nature of a measure. An asymmetry results, so that for complaints falling within the TBT Agreement, the complainant has the burden of proof and the list of exceptions available to the respondent is an open one, whereas for complaints falling under the GATT, the respondent has the burden of proof (under Article XX) and only a closed list of exceptions is available.[14]

Since the Appellate Body has called for a "coherent and consistent" approach to the TBT Agreement and the GATT (para. 5.123), it will probably try to interpret the GATT's closed list of legitimate regulatory policies in a way that covers all matters that fall within the TBT Agreement's open list. The AB noted that if, nonetheless, the asymmetry becomes a problem, "the authority rests with the Members of the WTO to address that imbalance" (AB Report, ¶ 5.129). If possible, the members should try to amend GATT Article XX to create an open list of exceptions, but that prospect is highly unlikely. The Appellate Body picks and chooses how it approaches interpretation, and was much more creative in interpreting TBT Article 2.1. Surely the terms "less favourable treatment" and "advantage" in GATT Articles I and III:4 can also be interpreted to avoid finding a public-oriented, nondiscriminatory regulation to be in violation of the GATT.

Third, given the important implications of the public morals exception, one might think that the Appellate Body would offer guidance on assessing whether a defense is genuine. Yet it offered none, appearing to leave the definition of a public morals defense largely to the discretion of WTO members. The Appellate Body could have listed relevant factors, such as the extent to which the respondent provides evidence of its public morals concerns and whether it has a domestic industry that benefits from them. But the Appellate Body reserved its scrutiny for the chapeau without providing further guidance on the public morals exception.

Fourth, by examining the discriminatory impact of the European Union's application of the IC exception, the Appellate Body suggested (in our view correctly) that the exception would otherwise have been fine even though it did not advance the underlying objective of protecting public morals concerns regarding seal welfare. However, it first cited previous AB jurisprudence

[14] The Appellate Body suggested that the asymmetry should not be a concern, but the United States has already pointed out in interim review in a subsequent case that providing consumer information is not among the list of Article XX exceptions. *See* Panel Report, United States—Certain Country of Origin Labelling (COOL) Requirements: Recourse to Article 21.5 of the DSU by Canada and Mexico, paras. 6.70–.75, WT/DS384/R, WT/DS386/R (Oct. 20, 2014).

holding that any justifiable discrimination under the chapeau must be "rationally related" to the measure's objective (para. 5.306 & nn.1522–24). Although the Appellate Body then slightly weakened this test by stating that "the relationship of the discrimination to the objective . . . is one of the most important factors, but not the sole test" (para. 5.321), it gave no further direction. It appears to be moving toward accommodating any *legitimate regulatory purposes* under the chapeau (such as the protection of the rights of indigenous communities) so long as the underlying measure falls within one of the policy objectives listed in Article XX(a)–(j), yet it failed to confront the issue clearly. The Appellate Body could have clarified that, under the chapeau, there is no "unjustifiable discrimination" if differentiation between products of different national origins reflects a legitimate regulatory objective. Had it done so, it would have brought its reasoning under the GATT chapeau and TBT Article 2.1 into closer alignment. But it did not.

Fifth, in one of its earliest cases, one dealing with a trade and environment matter, the Appellate Body declared that WTO agreements are "not to be read in clinical isolation of public international law," marking an important shift from former GATT jurisprudence.[15] In *EC—Seal Products*, the European Union cited public international law to support the IC exception in its submissions and in its oral argument, and in particular the UN Declaration and the ILO Convention on indigenous peoples' rights.[16] Yet, when addressing the justifiability of the IC exemption, the Appellate Body completely ignored the existence of such other international law, including the citations to it, and thus wrote formally in isolation of it.

The European Union should be able to comply with the AB decision while retaining the IC exception by adapting its measure to the AB concerns under the Article XX chapeau. The Union could require minimum humane hunting standards for use of the IC exception, and tighten the exception's criteria on traditional use in ways that contribute to the indigenous community's subsistence, in order to limit killings for commercial purposes involving the EU market. The Union could also make greater efforts to facilitate market access of seal products from Canadian Inuit. Canada has already adopted seal-hunting regulations and a targeted program for the purchase of Inuit products that provides a convenient method of identifying them pursuant to an IC exception (para. 5.330). Not surprisingly, three months after the AB decision, Canada signed a Joint Statement with the European Union regarding access to the EU market under the IC exception, suggesting that the matter is indeed now settled.[17]

The panel and AB reports in *EC—Seal Products* represent an important landmark recognizing a public morals exception on animal welfare grounds. They show once more that the WTO agreements permit legitimate government regulation. Nonetheless, the drafting of the AB report appears to signal a turn inward, a loss of judicial confidence, and a return toward the diplomats' jurisprudence of the GATT. Getting the outcome right is more important than polished drafting. But this inward turn and lack of public reasoning may not bode well for the WTO's future.

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[15] Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline at 17, WT/DS2/AB/R (Apr. 29, 1996) (*adopted* May 20, 1996).

[16] *See* text at note 10 *supra*.

[17] Commission Decision on the Joint Statement by Canada and the European Union on Access to the European Union of Seal Products from Indigenous Communities of Canada, C(2014) 5881 final, annex (Aug. 18, 2014).

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